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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

NO. 36.

R. E. GRAHAM and E. E. FOSTER, Co-partners, Doing Business Under the Firm Name of MILLIE FRANCIS OIL COMPANY, a Co-partnership, Petitioners,

v.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America in and for the Sixth Collection District, State of California.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

May it Please the Court:

The undersigned, as counsel for American Refractories Company, Clinton Iron & Steel Company, Diamond Alkali Company, Spear & Company, and Bessemer Coal & Coke Corporation, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae*.

MAYNARD TEALL,
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WILLIAM A. SEIFERT,
Counsel for American Refractories Company, Clinton Iron & Steel Company, Diamond Alkali Company, Spear & Company, and Bessemer Coal & Coke Corporation, as Amici Curiae.

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BRIEF OF AMICI CURIAE.

I.

PRELIMINARY STATEMENT.

(a) Reason for Brief.

The reason for the motion for leave to file this brief is that the writers are counsel for American Refractories Company, Clinton Iron & Steel Company, Diamond Alkali Company, Spear & Company, and Bessemer Coal & Coke Corporation, each of which corporations is plaintiff in a case involving the construction and constitutionality of Section 611 of the Revenue Act of 1928 and now pending in either the United States District Court for the Western District of Pennsylvania or the United States Circuit Court of Appeals for the Third Circuit.

(b) The Writers' Position.

We understand the Government's position to be that Section 611 means that if an assessment of tax was made prior to June 2, 1924, and a claim in abatement was thereupon filed and collection "stayed", the tax so assessed, if collected prior to enactment of the Revenue Act of 1928 or within one year after such enactment, cannot be recovered by the taxpayer, under *Bowers v. New York & Albany Lighterage Company*, 273 U. S. 346, notwithstanding that when the collection was enforced the period of time within which that might lawfully have been done had expired and the collection was then unlawful; and that Section 611 as so construed is constitutional and valid.

In contrast to that, our position is that Section 611 was not intended either to create or destroy substantive rights or to affect the suit of any taxpayer to recover any tax collected from him too late, and therefore unlawfully, but is only an administrative provision intended to control the Commissioner of Internal Revenue in granting claims, filed in his office, for refund or credit in a limited class of cases; that, as so construed, the section is constitutional; and that the section, construed as the Government construes it, is unconstitutional and void.

Adopting without discussion the Government's construction of Section 611, the court below decided this case on the meaning of the word "stay" (R. 31). If that construction is wrong, or if Section 611 as construed by the Government is unconstitutional, the court below is wrong—even though that court may have given the correct meaning to "stay".

The issue in this case, therefore, is not so narrow as the meaning of "stay". Before that question is

reached, the construction and constitutionality of Section 611 as a whole must be considered, and it is to that—more fundamental, we believe—aspect of the case that this brief is primarily directed.

II.

STATEMENT OF FACTS.

In January, 1920, after the plaintiffs, on March 22, 1918, had filed their 1917 return and subsequently paid the tax shown therein to be owing, the Commissioner of Internal Revenue assessed against them additional income and profits taxes for 1917 in the sum of $7,034.71 (R. 11-12). On February 11, 1920, plaintiffs filed claim for abatement thereof, which was rejected December 27, 1922 (R. 12). The additional tax and interest thereon amounted in the aggregate to $9,039.40, which the defendant collected, $2,039.40 on November 29, 1924, and $7,000.00 on December 3, 1924, plaintiffs making the payments under duress and protest (R. 12). Plaintiffs duly filed claim for refund, alleging that the collection was enforced too late and, on rejection of their claim, instituted this action for recovery of the money (R. 12-13).

The return was not false or fraudulent. There was never any agreement or so-called waiver extending the time for assessment or collection (R. 13). The collection was therefore unlawful and a taking of plaintiffs' property without any right in the defendant to do so, for the period for collection of 1917 income and profits taxes was—and still is—five years after filing of the return, and the time for collecting the tax here in issue expired, therefore, on March 22, 1923; Section 250 (d) of the Revenue Acts of 1918 and 1921; Section 277 (a) (2) of the Revenue Act of 1924; Section 277 (a) (3) of the Revenue Act of 1926. Even the

Revenue Act of 1928 itself left the so-called period of limitation on assessment and collection of 1917 taxes, to wit, five years, as it was under the prior acts, for it contained no amendment of the sections just cited (Section 275) and provided that (Section 1) "income, war-profits, and excess-profits taxes for taxable years preceding the taxable year 1928 shall not be affected by the provisions of this title"—Income Tax—"but shall remain subject to the applicable provisions of prior revenue Acts, except as such provisions are modified by Titles III, IV, and V of this Act or by legislation enacted subsequent to this Act."

The collection made late in 1924 was unlawful then and if made now would be in violation of the so-called statute of limitations. The rule of *Bowers v. New York & Albany Lighterage Co.*, 273 U. S. 346, would apply. At that point, however, the Collector directs attention to the fact that a claim for abatement was filed, contends that on that account collection was "stayed", and relies upon Section 611 of the Revenue Act of 1928, enacted May 19, 1928, almost four years after the unlawful collection, as express and valid statutory authority depriving the plaintiffs of their previous cause of action against him and permitting him—or the Government—to retain the money unlawfully collected. This brings us to the question in the case.

III.

STATUTES.

Revenue Act of 1928, TITLE I—INCOME TAX.

SUBTITLE A—INTRODUCTORY PROVISIONS.

Sec. 1. APPLICATION OF TITLE

"The provisions of this title shall apply only to the taxable year 1928 and succeeding taxable years. Income, war-profits, and excess-profits taxes for taxable years preceding the taxable year 1928 shall not be affected by the provisions of this title, but shall remain subject to the applicable provisions of prior revenue Acts, except as such provisions are modified by Titles III, IV, and V of this Act or by legislation enacted subsequent to this Act."

SUBTITLE C—SUPPLEMENTAL PROVISIONS.

SUPPLEMENT O—OVERPAYMENTS.

Sec. 322. REFUNDS AND CREDITS.

"(a) AUTHORIZATION.—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

"(b) LIMITATION ON ALLOWANCE—

(1) "Period of Limitation.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, un-

less before the expiration of such period a claim therefor is filed by the taxpayer.

(2) "Limit on Amount of Credit or Refund.—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund."

Revenue Act of 1928, TITLE IV—ADMINISTRATIVE PROVISIONS:

"Sec. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 611. COLLECTION STAYED BY CLAIM IN ABATEMENT.

"If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of

the period of limitation on assessment and collection."

"Sec. 612. REPEAL OF SECTION 1106 (a) OF 1926 ACT.

"Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926."

IV.

SUMMARY OF ARGUMENT.

Resort to reports of legislative committees is not to be countenanced if the statute in question is unambiguous. In no event can an intent not expressed in the statute be given force or effect. If ambiguous, the statute, being a taxing statute, is to be construed liberally in favor of the taxpayer.

Statutes are to be construed as prospective unless a clear intent appears to the contrary, and they are to be construed so as to avoid any question of their constitutionality.

Statutes of limitation promote repose and are favored in society.

A tax is not a debt in the ordinary meaning of that term and no action lies for its recovery unless provided by statute. Therefore, there is no liability to pay a tax after its collection is barred by the statute creating the tax.

Section 611 of the Revenue Act of 1928 does not affect substantive rights, but is a mere administrative provision governing the Commissioner in the matter of allowing credits or paying claims for refund. The section is not retroactive, but is wholly prospective in terms, purpose, and intent.

Section 612 of the Revenue Act of 1928 was adopted for the purpose of fully effectuating the change in administrative provisions made by Section 607 and of eliminating any possible conflict between the administrative rule in that section and the administrative rule in Section 1106 (a) of the Revenue Act of 1926.

Neither Section 607 nor 611 nor 612 is a statute of limitations, or an amendment thereof, or a withdrawal of the Government's consent to be sued, or a modification of such consent, or a withdrawal or modification of any judicial remedy.

If Section 611 be so construed as to prevent a taxpayer from recovering a debt existing and fully vested prior to enactment of the Revenue Act of 1928 it violates the Fifth Amendment.

The fact that the tax in question was collected prior to the passage of the Act of 1926 should have no bearing on the construction of an administrative provision of a taxing statute. Whether it be held that the sections of the Revenue Act in question be administrative or not, the answer in this case should not be predicated upon whether the liability had been extinguished when the tax was paid, but whether it was extinguished when the Revenue Act of 1928 was passed.

Even if Section 611 be held to be constitutional, retroactive, and not an administrative provision, it is not applicable to this case, as the word "stay" denotes more than a voluntary delay.

V.

ARGUMENT.

Introduction.

This brief is confined to questions of constitutionality and construction of Sections 611 and 612 of the Revenue Act of 1928 and to the meaning of the word "stay" as used in Section 611.

The fact that the tax in issue was collected after the bar of the statute of limitations is admitted. Immediately upon the collection thereof a debt arose in favor of the taxpayer and against the collector. Thereafter the Revenue Act of 1926 was passed and extinguished any liability, if it ever existed, on the part of the taxpayer to pay the alleged tax.

If that debt be not now owing and recoverable by suit the only reason is Section 611 of the Revenue Act of 1928, adopted three and a half years after the debt arose.

The issue, then, is whether Section 611 of that Act extinguishes a previously existing debt or precludes suit upon that debt, and if it does, whether it is in contravention of the Fifth Amendment.

As preliminary to our main points or argument, we draw attention to the following principles:

(1) The intent of the legislative body which enacted a statute is to be determined first by the language used; if that be unambiguous, there is no occasion to resort to the reports of legislative committees or other parol matters: *St. Louis, Iron Mountain & S. R. Co. v. Craft*, 237 U. S. 648;

(2) In no event may an intent not expressed in the statute as written and adopted be given force or effect; the intent of the legislature is law only so far as expressed in the statute; *id.;*

(3) Statutes, especially taxing statutes, will be construed as only prospective unless the language clearly shows that a retrospective effect was intended: *Union Pacific R. Co. v. Laramie Stock Yards Co.,* 231 U. S. 190, 199, 58 L. Ed. 179; *United States v. Magnolia Petroleum Co.,* 276 U. S. 160; *Russell v. United States,* 278 U. S. 181;

(4) Statutes will be so construed, if reasonably possible, as to avoid question of their constitutionality: *Lewellyn v. Frick,* 268 U. S. 238;

(5) Statutes of limitations promote repose, are vital to the welfare of society and are favored in the law. In *Wood v. Carpenter,* 101 U. S. 135, the court said:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary."

(6) The doctrine that taxing statutes are to be construed most strongly in favor of the taxpayer and against the Government, announced in *Gould v. Gould,* 245 U. S. 151, and followed in a long line of cases, has been recognized and affirmed in statute of limitations cases, the Government contending to the contrary in the late cases of *Bowers v. New*

York & Albany Lighterage Company, Russell v. United States, supra, and *United States v. Updike,* 281 U. S. 489;

(7) The general principle that a statute of limitations as a rule bars the remedy but does not extinguish the liability and that a moral obligation after the bar becomes effective is sufficient consideration for a new acknowledgment or a promise to pay the outlawed debt are recognized. But such principle should relate only to actual debts in existence and not to taxes, as a tax is not a debt in the ordinary sense of the word. In *37 Cyc.* 710, it is said:

> "As the obligation to pay taxes does not rest upon any contract express or implied, or upon the consent of the taxpayer, a tax is not a debt in the ordinary sense of that word; and for the same reason taxes are not assignable as ordinary debts, unless it is expressly so provided, nor are they the subject of setoff between the taxpayer and the state or municipality, nor do they draw interest like ordinary obligations, save where the statute so declares."

It is true that a tax has been classified as a debt within the meaning of R. S. Section 3466, establishing the priority of debts due from insolvents to the United States: *Price v. United States,* 269 U. S. 492. But that case lays down no proposition in any way analogous to the proposition here asserted by the Government that in so far as the statute of limitations affects the right to collect a tax, such tax is to be considered as an ordinary debt and the statute may be changed by will of the legislature, there being no vested right accruing under an ordinary statute of limitations as applied to ordinary debts.

In 37 *Cyc.* 1240 it is said:

"As a tax is not a debt in the ordinary meaning of that word, it is generally held that action will lie for its recovery, that is, that a suit at law cannot be maintained against the taxpayer unless a statute authorizes such an action."

Therefore, after the time within which suit may be instituted to recover a tax or within which a tax could lawfully be collected has expired, there is no liability to pay the tax and that liability cannot be recreated by a subsequent act: *Eberhart v. United States,* 204 Fed. 884 at 890; *Wm. Danzer & Co. v. Gulf & Ship Island R. Co.,* 268 U. S. 633, 69 L. Ed. 1126; *Wettengel v. Robinson,* 300 Pa. 355, 365. The creation of the right to sue or collect must be given in the act creating the tax and fixing the limitation period.

A.

SECTION 611 OF THE REVENUE ACT OF 1928 DOES NOT AFFECT SUBSTANTIVE RIGHTS, BUT IS A MERE ADMINISTRATIVE PROVISION GOVERNING THE COMMISSIONER IN THE MATTER OF ALLOWING CREDITS OR PAYING CLAIMS FOR REFUND; MOREOVER, THE SECTION IS WHOLLY PROSPECTIVE IN TERMS, PURPOSE AND INTENT.

Sec. 611 is an exception to or qualification of Sec. 607; its meaning cannot be ascertained unless Sec. 607 be considered.

Sec. 607 contains but one sentence. The subject is "any tax", which is made to include interest, etc. and taxes paid either before or after enactment of the statute. The predicate is "*shall* be considered * * * and *shall* be credited or refunded". Although Sec. 607 applies as well to taxes previously assessed as to taxes to

be assessed in future, what is to be done about them, under the provisions of the section, is to be done in the future.

The same is true of Sec. 611. The predicate is "*shall not* be considered". Then is added "*under the provisions of section 607*", showing that the purpose of Sec. 611 is to take out of Sec. 607 a situation that would otherwise be within it.

If the sections merely define "overpayment", the definition is for the future and not for the past. They appear to go farther than that, however, and to impose a rule of action upon somebody—always for the future.

The Collector says the rule is imposed upon the world at large, including the courts. The writer hereof submits that the rule is imposed upon the Commissioner and the Commissioner only, has reference to his action in the future, and deals with a matter of internal administration of the Bureau of Internal Revenue with which courts and litigants are not concerned.

That neither section is addressed to the courts or intended to affect the action or the judgment of any court in any litigated case is obvious. Sec. 607 provides that under certain circumstances the tax "shall be considered an *overpayment* and shall be *credited* or *refunded* to the taxpayer *if claim therefor is filed* within the period of limitation * * *." Sec. 611 provides that under certain other circumstances the payment "shall not be considered as an overpayment *under the provisions of section 607* * * *." No court either refunds a tax or orders anybody else to refund it; judicial procedure in a tax case is to render judgment for the plaintiff against the defendant, or *vice versa*, as in any other action at law. Nor is there any

judicial process by which an overpayment of tax may be "credited * * * to the taxpayer". Claims for refund are not filed in court.

There is but one person authorized to make refund of or allow credit for an overpayment of taxes or with whom a taxpayer may file a claim for refund or credit. That person is the Commissioner. R. S. 3220 authorizes the Commissioner to "remit, refund, and pay back all taxes erroneously or illegally assessed or collected" and R. S. 3226 provides that suit shall not be maintained for recovery of a tax erroneously or illegally assessed or collected "until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue * * *." (R. S. Sec. 3226; Acts Nov. 23, 1921, c. 136, sec. 1318, 42 Stat. 315; June 2, 1924, c. 234, sec. 1014, 43 Stat. 343; Feb. 26, 1926, c. 27, sec. 1113, 44 Stat. 9). Plainly, therefore, Secs. 607 and 611 refer to action of the Commissioner, directing him to allow refund or credit in one set of circumstances and not to allow it in another set of circumstances.

Legislative history confirms that construction. The *Revenue Act of 1926* was in force when the *Revenue Act of 1928* was adopted.

Section 1111 of the Revenue Act of 1926 amending R. S. 3220 authorized the Commissioner to refund all taxes erroneously or illegally assessed or collected, all penalties collected without authority, etc.; also, to repay to any Collector or Deputy Collector the full amount of such sums of money as may be recovered against him in any court for any internal revenue taxes collected by him, with the costs and expenses of suit, etc., except as provided in Sections 284 and 319.

Section 284 provided that repayment should be made only in cases of "overpayment", and Section 319 authorized a refund of estate taxes only—pursuant to

decision of the Board of Tax Appeals. The former authorized a voluntary refund, the latter authorized a refund by order of another department of the executive branch of the Government. Under the latter, refunds in statute of limitations cases could be made.

Section 1106 (a) prohibited refunds by the Commissioner except in cases where the taxpayer had overpaid the tax. This section has been held to be administrative, controlling the action of the Commissioner in making voluntary refunds and having no bearing in an action against the Collector recovery from whom depends upon other applicable statutes: *Thornhill Wagon Company v. Noel,* 17 F. (2d) 407; *Gove v. Nichols,* 23 F. (2d) 856; *Ellay Company v. Bowers,* 25 F. (2d) 637, certiorari denied, 48 S. Ct. 601.

In the *Thornhill Wagon Company* case the court held:

> "The conclusion reached by me as to this position is that section 1106 (a) is not susceptible of this construction. It does indeed provide that no refund shall be made except for overpayment, but this unquestionably was intended to apply to voluntary refunds by the Commissioner and to control the action of the executive departments in such respects. If the tax demanded, and to collect which the distraint was issued, is hereafter paid, and an action at law is begun for its recovery, such action will be against the collector, individually, and not against the United States (*Sage v. United States,* 250 U. S. 33, 37, 39 S. Ct. 415, 63 L. Ed. 828), and the repayment, if recovery is had, will depend upon other applicable statutes."

If the Government's present contention be correct, why was not the theory advanced that Section 1106 (a)

of the Revenue Act of 1926 barred recovery of *any* tax after the bar of the statute of limitations except in cases where the taxpayer had actually overpaid the tax? The same reasoning supports both theories. The courts, as hereinbefore stated, have held that that section is administrative and only bars the Commissioner from making a voluntary refund in statute of limitations cases unless the tax has been overpaid, and does not defeat a taxpayer's right to recovery by suit.

For two years prior to the adoption of the Revenue Act of 1928, therefore, the law was that the Commissioner could make refund only in case of "overpayment", i. e., where the tax was excessive in *amount*. Where the contention was illegality of assessment or collection, as in a statute of limitations case, the Commissioner could not make a refund and, no matter how clear the case, the taxpayer was obliged to sue the Collector in the courts. That limitation on the Commissioner's authority was not unnatural. He is a fiscal officer, not a law officer, and a Congress willing for him to decide questions of fact and figures might well be unwilling, and as shown by the *Revenue Act of 1926* was unwilling, for him to decide certain purely legal questions. By 1928, however, the law of the statute of limitations had been considered and most questions (except the new ones raised by the *Revenue Act of 1928* itself) decided in numerous litigated cases, wherefore Congress was willing to confer upon the Commissioner authority, taken away from him in 1926, to make a refund or allow a credit where the error or illegality was not in determination of the *amount* of the tax but in the fact that assessment or collection had been made after expiration of the period of limitation. Accordingly, the Commissioner being authorized by Sec. 322 of the 1928 Act to make refund or

allow credit in case of "overpayment", Congress, by Sec. 607, extended the definition of "overpayment" to include "any tax * * * assessed or paid * * * after the expiration of the period of limitation properly applicable thereto." Cases in which the assessment had been made several years before and claims in abatement had been filed were, however, a special class in which, as subsequent litigation has shown, somewhat difficult questions of law were presented. In that particular class of cases, Congress was not willing to leave the decision to the Commissioner. Accordingly, by Sec. 611, Congress provided that where the assessment was prior to June 2, 1924 and claim in abatement was filed and collection stayed, the payment when made should not "be considered as an overpayment *under the provisions of section 607,* relating to payments made after the expiration of the period of limitation on assessment or collection," and in that case left the taxpayer to his remedy in court as before.

Secs. 607 and 611 are supplemental to Sec. 322, which authorizes the Commissioner to allow refund or credit in case of "overpayment", and, when read in connection with that section, are clearly perceived to have reference to one matter only, to-wit, the authority of the Commissioner to allow refund or credit on filing with him of a claim therefor.

The foregoing construction is further confirmed by the fact that Secs. 607 and 611 appear in the Act under "TITLE IV — ADMINISTRATIVE PROVISIONS". Section 1106 (a) of the Revenue Act of 1926 appeared under a similar title and was, as we have hereinbefore shown, uncontrovertedly held to be administrative only. Administrative provisions of a statute are addressed to the officer or body who is to administer the statute.

Neither substantive rights nor judicial remedies would be placed under that heading.

Sec. 611 does not provide generally that payment under the circumstances stated therein shall be deemed to have been lawful and proper, but only that it shall not be considered an overpayment *"under the provisions of section 607."* In other words, the enlargement of the definition of "overpayment" is not extended to the case referred to in Sec. 611; as to that case, the Commissioner remains without authority, and the taxpayer must bring suit against the Collector—as he was required to do in *every* statute of limitations case under the 1926 Act.

Nothing retrospective is expressed or even implied in either section. Sec. 607 confers on the Commissioner an authority he had not possessed since 1926, and Sec. 611 excepts one special situation from the authority thus conferred.

The construction above submitted is not only reasonable and, indeed, almost unavoidable when the legislative history is considered, but conforms to the rule that provisions of a tax law shall not be construed as retrospective unless clearly so intended and also to the rule that a statute should, whenever reasonably possible, be so construed as to avoid constitutional questions.

B.

SECTION 612 OF THE REVENUE ACT OF 1928 WAS ADOPTED FOR THE PURPOSE OF FULLY EFFECTUATING THE CHANGE IN ADMINISTRATIVE PROVISIONS MADE BY SECTION 607 AND OF ELIMINATING ANY POSSIBLE CONFLICT BETWEEN THE ADMINISTRATIVE RULE IN THAT SECTION AND THE ADMINISTRATIVE RULE IN SECTION 1106 (a) OF THE REVENUE ACT OF 1926.

Sec. 1 of "TITLE I—INCOME TAX" of the *Revenue Act of 1928* is:

> "The provisions of this title shall apply only to the taxable year 1928 and succeeding taxable years. Income, war-profits, and excess-profits taxes for taxable years preceding the taxable year 1928 shall not be affected by the provisions of this title, but shall remain subject to the applicable provisions of prior revenue Acts, except as such provisions are modified by Titles III, IV, and V of this Act or by legislation enacted subsequent to this Act."

The *Revenue Act of 1928* is unlike the Acts of 1918, 1921, 1924 and 1926 in that it is not what may be called an omnibus act; it allows the provisions of the last preceding act to stand except as changed, added to, or subtracted from by the 1928 Act itself. Accordingly, unless change were made in Sec. 1106 (a) of the Act of 1926, the provisions thereof would stand. One of those provisions was that "no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax * * *." That provision had been changed, except in the special case referred to in Sec. 611, by Sec. 607 of the 1928 Act, and, accordingly, Sec. 1106 (a) of the Act of 1926 was repealed.

Congress might have reached the same result that it did reach if it had merely amended Sec. 1106 (a) by adding thereto, as a proviso, the enlarged definition of "overpayment" contained in Secs. 607 and 611 of the 1928 Act. It chose instead to add 607 and 611 as new sections and repeal Sec. 1106 (a) of the 1926 Act entirely.

Sec. 612 is also under "TITLE IV—ADMINISTRATIVE PROVISIONS."

What the specific reason was for making the repeal of Sec. 1106 (a) date back to enactment of the section is a matter of conjecture. A possible explanation is that there was always doubt and confusion as to the meaning of Sec. 1106 (a) and that the Commissioner himself may have so far misunderstood it as to have made some refunds in statute of limitations cases though not authorized to do so. Repeal of Sec. 1106 (a) as of the date of its enactment would legalize such refunds and retroactively give the Commissioner authority to do the same thing between 1926 and 1928 that Sec. 607 of the Act of 1928 authorized him to do from 1928 onwards.

Furthermore, Section 612 does not clearly manifest an intention to re-open cases like the present or cases where the tax was collected after the passage of the Act of 1926, either as to collection of the tax or as to recovery of an illegally collected tax. On the contrary, the expressed reason, appearing in the report of both the Senate and the House proposing the Revenue Act of 1928, was because—

> "Section 1106 (a) of the 1926 Act (26 U. S. C. A. § 1249 note) failed to resolve many doubtful questions as to the legal effect which follows the

> expiration of the period of limitations prescribed for the assessment or collection of a tax, or for the making of a refund or credit, or the bringing of a suit for refund." (See House Report No. 2, p. 33 and Senate Report No. 960, p. 41, both 70th Congress, 1st Session).

In the words of the Supreme Court of Pennsylvania:

> "The utmost effect which can be given to that reason, and it is the only one of which we have been advised, is that, when making settlements in the future, the government shall not be hampered by the 'doubtful questions' which bothered it in the past." *Wettengel v. Robinson,* 300 Pa. 355, 368.

The Government will hardly contend that the purpose was to revive a liability expressly "extinguished" by Sec. 1106 (a) two years before; for Congress is without power to re-create a liability previously extinguished: *Danzer & Co. v. Gulf & Ship Island R. R. Co.,* 268 U. S. 633, and to same effect specifically with regard to this particular statute, see, *Dobbins v. Commissioner,* 31 F. (2d) 935, (C. C. A. 3rd C.); *United States v. John Barth Co.,* 27 F. (2d) 782, (C. C. A. 7th C.), reversed by this court on other grounds in 279 U. S. 370, 73 L. Ed. 743; *Erie Coal & Coke Co. v. Heiner,* 33 F. (2d) 135, affirmed in 42 F. (2d) 214; *Pepsin Syrup Co. v. Schwaner,* 35 F. (2d) 197; and *Wettengel v. Robinson,* 300 Pa. 355, 366.

C.

NEITHER SECTION 607 NOR 611 NOR 612 IS A STATUTE OF LIMITATIONS OR AMENDMENT THEREOF, OR A WITHDRAWAL OF THE GOVERNMENT'S CONSENT TO BE SUED OR MODIFICATION OF SUCH CONSENT, OR A WITHDRAWAL OR MODIFICATION OF ANY JUDICIAL REMEDY.

A taxpayer does not derive either his cause of action or his remedy of suit from Sec. 607, hence Sec. 611, providing for an exception to Sec. 607, does not affect either his cause of action or his remedy.

Previous acts did not contain the provisions of Sec. 607 or any similar provisions. Yet long prior to 1928 taxpayers had and successfully prosecuted causes of action when a collector enforced payment of taxes after expiration of the statutory period: *Bowers v. New York & Albany Lighterage Co.*, 273 U. S. 346. Those causes arose by virtue of the applicable *statute of limitations, contained in Sec. 250 (d) of the Acts of 1918 and 1921 and Sec. 277 of the Acts of 1924 and 1926.* Sec. 607 is not the statute of limitations even under the Act of 1928 itself; the section on that subject is Sec. 275, under an entirely different title, to-wit, "TITLE I—INCOME TAX". These statutes of limitations are not repealed or amended or even referred to in Sec. 607 or 611 or 612, and causes of action will continue to arise under one or more of them in the future as in the past. This particular taxpayer's cause of action arose under Sections 250 (d) of the Revenue Acts of 1918 and 1921; Sections 277 of the Revenue Acts of 1924 and 1926. *Those are law today, unaffected by Sec. 607 or Sec. 611 or any other section of the Act of 1928.*

Since no cause of action arose or can arise under Sec. 607, but must arise if at all under entirely differ-

ent sections or statutes, Sec. 611, creating an exception to Sec. 607, does not destroy, withdraw, or qualify any cause of action.

Even the right to sue—the judicial remedy—is not derived from Sec. 607, hence is not conditioned or otherwise affected by Sec. 611. This action and others like it were brought under *R. S. 3226,* authorizing suit against a collector after rejection by the Commissioner of a claim for refund, and not under the provisions of any of the revenue acts except insofar as R. S. 3226 has been expressly amended by such acts. In point of fact, R. S. 3226 was specifically amended by Sec. 1318 of the Act of 1921, Sec. 1014 of the Act of 1924, and Sec. 1113 of the Act of 1926. R. S. 3226 is not even mentioned in Sec. 607 or 611 or 612 of the Act of 1928 and obviously is not amended by any of them.

It cannot be too strongly emphasized that since neither the cause of action nor the judicial remedy is derived from Sec. 607, neither the one nor the other is affected by Sec. 611. Sec. 611 must, therefore, be an administrative provision.

Without completely analyzing Secs. 607 and 611 to ascertain their real purpose and intent, those taking the other side of the question under discussion *assume* that the purpose and intent of Sec. 611 were to prevent a taxpayer from recovering a debt owed to him before Sec. 611 was adopted, and then proceed to argue that the section is constitutional. Tacitly admitting that a pre-existing debt may not be destroyed by legislative fiat and that Congress is without power to revive a previously extinguished liability, they argue thus: (1) The sovereign may not be sued save by its own consent; (2) Giving such consent, the

sovereign may condition it in such manner as may be desired or may even withdraw it altogether; (3) That is what the United States has done by Sec. 611; (4) Sec. 611 is therefore constitutional.

(1) and (2) are admitted. We might even admit (4) if (3) were true. But (3) is not true.

In the first place, in this type of case the Government is not sued at all, and the question of its consent to be sued is not, therefore, involved. The action is brought against the collector. The United States is not a party and has no interest in the litigation unless and until it voluntarily assumes the collectors' liability after action brought: *Sage v. United States,* 250 U. S. 33. R. S. 3226 is not a consent of the United States to be sued, but merely provides a statutory remedy against the collector personally.

If that point be waived, and if we assume, contrary to fact, that R. S. 3226 is a statute evidencing the consent of the United States to be sued, the argument of those opposed to our view is still fallacious; for Sec. 611, far from amending or modifying R. S. 3226 in the slighest particular, does not even mention it. In the Acts of 1921, 1924 and 1926, wherein R. S. 3226 *was* amended, Congress evidenced its amending purpose and intent by setting out R. S. 3226 at length in the amended form. It is impossible to believe that they intended, in 1928, to amend R. S. 3226 without making any reference to it at all.

It is clear, therefore, that Sec. 611 is not a statute of limitations or amendment thereof, and has no reference to any judicial remedy either against the United States or a Collector of Internal Revenue or to consent of the United States to be sued. In short, the Gov-

ernment's construction will not stand analysis, and since the Government's argument on the constitutional question rests on the construction given to the section, the constitutional argument also must fall.

D.

IF SECTION 611 BE SO CONSTRUED AS TO PREVENT A TAXPAYER FROM RECOVERING A DEBT EXISTING AND FULLY VESTED PRIOR TO ENACTMENT OF THE REVENUE ACT OF 1928, IT VIOLATES THE FIFTH AMENDMENT.

Statutes of limitations usually go to the remedy only and may be amended. But Sec. 611 is not a statute of limitations and leaves all previous statutes of limitations as to assessment and collection of income taxes, contained in divers sections of prior acts, absolutely untouched. *A collection of 1917 tax made more than five years after the return was filed, even though claim in abatement was filed and collection stayed, is just as unlawful today as prior to the Act of 1928,* for the 1928 Act does not change the period of time within which a 1917 tax must be assessed and collected.

The Government may give or withhold its consent to be sued and, having given it, may condition or withdraw it. But the cause of action in this type of case is against the collector personally under R. S. 3226; moreover, even if R. S. 3226 were a consent by the Government itself to be sued, Sec. 611 does not change it in any particular.

If, therefore, Sec. 611 does prevent recovery of this pre-existing debt, it does not have that effect because it changes the period of limitation within which a 1917 tax must be collected or modifies or withdraws any *remedy,* but because *it destroys the pre-existing right or debt itself.*

Whatever the powers of Congress may be as to amending or repealing statutes of limitations, or withdrawing or modifying procedural remedies, or giving, withholding, withdrawing, modifying, or conditioning the consent of the United States to be sued, Congress does not have power to leave the definition of an unlawful collection just as before, to leave in full force and effect as to all taxpayers the consent of the United States to be sued for taxes unlawfully collected, and to prevent recovery on the part of a limited class of taxpayers by pronouncing the fully vested rights of that limited class destroyed or extinguished. That is the merest confiscation.

The United States may escape payment of its bonds by withholding its consent to be sued upon them. It may not, however, leave in full force and effect its previously given consent to be sued by any and all holders and escape payment of a certain few bonds of the series by pronouncing those particular debts extinguished; once in court, the United States stands like any other litigant: *United States v. Arredondo,* 6 Pet. 689; *Central Trust Co. v. Treat, Collector,* 192 Fed. 942. The absence of power in Congress to extinguish a debt owing by Rex B. Goodcell to Messrs. Graham and Foster is even more obvious.

A debt is property and may not be taken by the United States save by due process of law. Legislative fiat is not due process.

The Fifth Amendment "is a restraint on the legislative as well as the executive and judicial powers of the government, and cannot be so construed as to leave Congress to make any process 'due process of law', by its mere will": *Den v. Hoboken Land and Improvement Co.,* 18 How. (59 U. S.) 272.

Most jurisdictions lay down the doctrine, without qualification, that a legislature may not remove the de-

fense of statute of limitations by repealing the statute after the defense has become complete: see cases at *12 C. J.* 980. This Court has not gone quite so far, holding that the mere procedural defense of statute of limitations is not a vested property right and permits the statute to be repealed, even if the period of limitation has wholly elapsed, when the effect of repeal is only to prevent interposition of the statute as a procedural defense.

All Courts, including this Court, agree, however, that a statute of limitations may not be repealed when, or to the extent that, *property rights have vested* by passing of the entire period of limitation: see cases cited at *12 C. J.* 981. Thus in the leading case of *Campbell v. Holt,* 115 U. S. 620, Mr. Justice Miller said:

> "It may, therefore, very well be held that in an action to recover real or personal property, where the question is as to the removal of the bar of the Statute of Limitations by a legislative Act passed after the bar has become perfect, such Act deprives the party of his property without due process of law. The reason is that, by the law in existence before the repealing Act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the Act the effect of transferring this title to plaintiff would be to deprive him of his property without due process of law."

In other words, property rights that have become fully vested under a statute of limitations may not be divested by repeal of the statute. The rule applies *a fortiori* here, for Congress has not amended or repealed the statute of limitations, but, on the Government's theory of the effect of Sec. 611, has gone farther and undertaken to destroy the cause of action or debt itself.

In *Eberhart v. United States*, 204 F. 884, the Circuit Court of Appeals for the Eighth Circuit held that where by lapse of time sureties on a bond had ceased to be liable, Congress was without power to revive the liability. The concurring opinion of Judge Sanborn in that case presents our point fully. In his opinion Judge Sanborn held:

> "An act of Congress, which at the same time and in itself authorizes or creates a new liability and prescribes the limitations thereof and of its enforcement, makes those limitations conditions of the liability itself. Such an act is not a statute of limitations, and a compliance with the conditions which it prescribes is indispensable to the enforcement of the liability it authorizes or creates (*The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. 140, 30 L. Ed. 358; *Pollard v. Bailey*, 20 Wall. 520, 526, 527, 22 L. Ed. 376; *Bank v. Francklyn*, 120 U. S. 747, 756, 7 Sup. Ct. 757, 30 L. Ed. 825; *Boyd v. Clark* (C. C.), 8 Fed. 849; *Brunswick Terminal Co. v. National Bank of Baltimore*, 99 Fed. 635, 638, 639, 40 C. C. A. 22, 25, 26), because such limitations are conditions of the liability itself and not limitations of the remedy only. They are excepted from the rule announced in *Campbell v. Holt*, 115 U. S. 620, 628, 6 Sup. Ct. 209, 29 L. Ed. 483, to the effect that the right to defeat a just personal debt for a common-law liability, in that case for a conversion of the plaintiff's money, is not a vested right, which the Legislature may not overthrow at pleasure by extending the time for collecting it."

Judge Sanborn makes very clear the distinction between a repealing statute that merely removes the bar of the statute of limitations as a defense and a repealing statute that attempts to divest property rights previously vested under the statute repealed.

In *Wettengel v. Robinson, supra,* the Supreme Court of Pennsylvania clearly distinguishes the case of *Campbell v. Holt, supra,* upon which the Government strongly relies, as follows:

> *"Campbell v. Holt,* 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483, relied on by the government, decides simply that a statute which limits the time within which suit may be brought may be repealed, although, in the particular case under consideration, the statutory limitation had run before the repealing statute was passed. Its effect as a precedent has been limited, however, to cases where the repealed statute was purely one of limitation. On this point see *William Danzer & Co. v. Gulf & Ship Island R. Co.,* 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 1126, where *Campbell v. Holt* is distinguished, and it is held that, *if a statute both creates the liability and limits the time within which suit may be brought, the limitation cannot be repealed after the right to sue has been lost, because (page 637 of 268 U. S., 45 S. Ct. 612, 613) the 'effect would be to deprive defendant of its property without due process of law in contravention of the Fifth Amendment'."* (Italics ours).

In this brief, we have used the term "statute of limitations". It is generally used in these cases. Nevertheless, the statutes of limitations contained in the revenue acts are not of the same nature as, for instance, the six-year statute for suit on a contract, which is waived if not pleaded. They do not merely provide a defense to a suit entered by the Collector; in fact, the Collector will seldom or never enter a suit since he may proceed by distraint, and in the latter event the taxpayer has no opportunity to plead the statute of limitations or anything else. The effect of the statute

of limitations on income taxes is that the tax is *gone* when the five years have passed; the tax liability exists for five years and then, unless extended by statutory agreement between the Commissioner and the taxpayer, *expires*. When, therefore, Sec. 1106 (a) of the *Revenue Act of 1926* provided that running of the statute should not only bar the remedy but extinguish the liability, it recognized, rather than establish, a principle of law. In few if any of these cases has the statute been interposed as a defense; it has been the basis of an action against the Collector for collecting money that had ceased to be owing. It is of the essence of the *tax* that it be assessed and collected within the statutory period. The so-called period of limitation goes not merely to the remedy, but to the liability itself.

This Court suggests that view in *Bowers v. New York & Albany Lighterage Co.*, 273 U. S. 346, 349:

> "The purpose of the enactment was to fix a time beyond which steps to enforce collection might not be *initiated*." (Italics ours).

And (351):

> "A reasonable view of the matter is that it was the intention of Congress by the clause here in question to protect taxpayers *against any proceeding whatsoever for the collection of tax claims not made and pressed within five years*." (Italics ours).

United States v. Heinszen & Co., 206 U. S. 370, and *Rafferty v. Smith, Bell & Co.*, 257 U. S. 226, are very different from this case. There, a tax had been imposed, but the imposing and collecting agencies were without authority. Their acts were ratified by retrospective legislation, which latter was sustained on the familiar doctrines that a principal may always ratify the previous act of his agent and that Congress could enact a taxing statute retroactively. In the case at bar

the Collector did not lack authority as agent of the United States; neither did Congress levy a tax retroactively; the cause of action was that, whether agent of the United States or not, he compelled the taxpayer to pay money which substantive law provided it should not be required to pay. Moreover the Statutes involved in those two cases specifically ratified the illegal acts of the collecting agents and levied a tax retroactively. There is no specific retroactive ratification of any illegal acts of the collecting agencies in either Sections 607, 611 or 612, and ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act. *Forbes Pioneer Boat Line v. Board of Commissioners,* 258 U. S. 338.

When the five years had passed, this taxpayer ceased to owe the tax. If that proposition be denied, denial must be followed by admission that the Collector was without right—not merely without authority—to make the collection and in doing so acted contrary to express provision of the law—as the law existed then and *as it exists now.* Accordingly, on either theory, immediately after the collection in 1924 the Collector owed the taxpayer $9,039.40, which sum the taxpayer was authorized to recover back from him under R. S. 3226. The five-year provision of the law has not been changed; what was a legal wrong in 1924 is a legal wrong today. Moreover, R. S. 3226 remains as before; the collector is still liable to suit for any and all taxes erroneously or illegally collected. If, therefore, Sec. 611 prevents recovery, it is because Sec. 611 provides for extinguishment of the debt of $9,039.40 owed by the Collector to the taxpayer during some three and a half years before the section was enacted. Surely that cannot be done, especially when all courts agree that even an ordinary statute of limitations cannot be repealed without a saving of all property rights previously vested under it.

E.

THE FACT THAT THIS TAX WAS COLLECTED PRIOR TO THE PASSAGE OF THE ACT OF 1926 IS IMMATERIAL.

There are numerous cases involving the construction and effect of Sections 607 and 611 of the Revenue Act of 1928. In some, the tax was collected prior to the passage of the Revenue Act of 1926, while in others the tax was collected after the passage of the Revenue Act of 1926 and prior to the passage of the Revenue Act of 1928. In the latter cases the decisions have uniformly been in favor of the taxpayer: *Erie Coal & Coke Company v. Heiner,* 33 F. (2d) 135, affirmed by the Circuit Court of Appeals for the Third Circuit in 42 F. (2d) 214; *Diamond Alkali Company v. Heiner,* 39 F. (2d) 643; *Clinton Iron & Steel Company v. Heiner,* 30 F. (2d) 542; *Wyman, Partridge & Company v. United States,* 41 F. (2d) 886, *certiorari* granted October 20, 1930, at No. 416 October Term, 1930. In the former cases the majority of the decisions have been in favor of the Government, the following being in favor of the taxpayer: *United States v. Burden, Smith & Company,* 33 F. (2d) 229, *Cutcheon v. Rafferty,* 34 F. (2d) 708; *Sugarland Industries v. Bass,* 36 F. (2d) 375; and *Bessemer Coal & Coke Corporation v. Heiner,* 39 F. (2d) 492.

It is the writers' position that the date of collection is immaterial in view of the fact that the sections involved are administrative provisions dealing solely with the power and authority of the Commissioner to make voluntary credits or refunds and having no effect whatsoever on the right of the taxpayer to recover in an action against the Collector.

We do contend, however, that if the tax were collected after the liability had been extinguished, the

tax was actually overpaid and Congress had absolutely no constitutional power to re-create that extinguished liability.

We believe that in the instant case the answer should not be predicated upon whether the liability had been extinguished when the tax was paid, but whether it was extinguished when the Revenue Act of 1928 was passed. The right to recover the illegally collected tax vested in the taxpayer immediately upon collection, whether before or after the 1926 Act. Upon the passage of the 1926 Act that right to recover became irrevocably vested in the taxpayer.

F.

EVEN IF SECTION 611 BE HELD TO BE CONSTITUTIONAL, RETROACTIVE, AND NOT AN ADMINISTRATIVE PROVISION, IT IS NOT APPLICABLE TO THIS CASE, AS THE WORD "STAY" DENOTES MORE THAN A VOLUNTARY DELAY.

Prior to the Revenue Act of 1928 the filing of a claim in abatement did not toll or stay the running of the statute of limitations or stay the collection of the tax. *Appeal of Ocean Accident & Guaranty Corporation*, 6 B. T. A. 1045. Neither did it create an estoppel to assert the statute of limitations. *United States v. John Barth Co.*, 27 F. (2d) 782.

In the latter case the Circuit Court of Appeals for the Seventh Circuit held that full effect must be given to the statute of limitations notwithstanding that the taxpayer had filed a claim in abatement and had also given a surety bond for the amount of the tax. The court said:

"This express provision (for mutual consent in writing) covering tolling of the statute of limi-

tations excludes the possibility of implied waivers. *Expressio unius est exclusio alterus.*"

This case was reversed on other grounds by the Supreme Court on May 13, 1929, 279 U. S. 370, 73 L. Ed. 743.

In *Botany Worsted Mills v. United States,* 278 U. S. 282, 73 L. Ed. 379, the Supreme Court of the United States had before it a case where the taxpayer was alleged to have gone much farther than the filing of a claim in abatement, i. e., to have made a compromise and settlement with the Commissioner of Internal Revenue, but without the advice and consent of the Secretary of the Treasury and the Attorney General as required by R. S. Section 3299. The court held that the agreement was unenforceable because in conflict with the statute and that the unenforceable agreement would not estop the taxpayer to assert its rights with like effect as if the agreement had not been made. In the opinion Justice Sanford said:

"When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

The Act itself predicates the tolling of the statute of limitations, not alone on the fact that a claim in abatement was filed, but also and conjunctively on the fact that the collection must be stayed as a result of the filing. The filing alone does not and never did automatically stay the collection of the tax. On the contrary Reg. 62, promulgated under the Act of 1921, specifically provided in Article 1032 that:

"The filing of a claim in abatement does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and

leave the taxpayer to his remedy by a claim for refund."

Finally the Commissioner himself, by his General Counsel, has held that the filing of a claim for abatement does not extend the time for collection of the tax.

"The taxpayer filed a claim in abatement merely for the purpose of requesting a redetermination of his liability for the amount assessed. Manifestly, such a claim, which sets forth only the grounds relied upon to show that the tax is not due, containing no promise, either express or implied, to pay the tax, does not give rise to an understanding between the taxpayer and the Commissioner to treat any fact as settled. The situation, therefore, with reference to the collection of the tax, remains the same as before the claim was filed; the Commissioner is not precluded from instituting appropriate action for the collection thereof, nor has the taxpayer acquired a new or additional right to have the same postponed. As stated in article 1032, Regulations 62. (See quoted article, *supra*).

G. C. M. 2757, C. B. VII-2, page 302.

Even the filing of a bond with a claim in abatement does not toll the running of the statute of limitations, but the action thereafter is on the bond and not on the liability for the tax. *United States v. John Barth Co., supra.*

Therefore there must be some additional data or facts submitted which would show that the collection was stayed, not merely delayed, as a result of the filing of the claim in abatement. There must be some averment of a contract or agreement between the Com-

missioner or the Collector and the taxpayer to that effect. The mere fact that collection was not made is no evidence of a stay. A stay denotes an agreement not to collect or a prohibition on the right to collect. There was no prohibition on the Collector's right to collect, nor was there any right on the part of the taxpayer to require the Collector to postpone collection. A voluntary omission to enforce collection does not constitute a stay; for example, a private litigant cannot stay the running of the statute of limitations because he voluntarily elects not to enforce his rights. The statute of limitations runs notwithstanding. In order to effect a stay, whether of execution or of proceedings or of the statute of limitations, there must be a bilateral contract to that effect binding upon both parties, and no action of one party uncommunicated to the other will operate as a stay. The word "stay" as used in this Act signifies a legal stay. Were it otherwise, the word "delay" would be used.

The Commissioner has used the word "delay" in his Regulations promulgated under the Act, but he has no authority to read into the Act a meaning not intended by Congress. Congress could easily have used the word "delay" instead of the word "stay" had it intended to enact such a provision.

The defendant does not aver that the collection of the tax was stayed by him as a result of the filing of the claim in abatement. Neither do the stipulated facts disclose that the defendant Collector stayed or even delayed the collection of this tax on account of the filing of the claim in abatement.

Conclusion.

Our position has been briefly but effectively stated by the Hon. Robert M. Gibson, Judge of the District Court of the United States for the Western District of Pennsylvania, in the case of *Clinton Iron & Steel Company v. Heiner,* 30 F. (2d) 542, at page 544, as follows:

"Congress may, under certain circumstances, ratify an erroneous collection of tax retroactively. *United States v. Heinszen & Co.,* 206 U. S. 370, 27 S. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688; *Rafferty v. Smith, Bell & Co.,* 257 U. S. 226, 42 S. Ct. 71, 66 L. Ed. 208. The situation in the case at bar, however, is not that of the cases cited. In the instant case the tax was collected by the defendant as collector of internal revenue, at a time when existing statutory law declared that not only was the right of collection barred, but that the liability had been extinguished. The plaintiff, by statute, was denied relief by injunction. It could do nothing but pay the amount unlawfully demanded and seek its remedy in an action against the collector. Before bringing such action it was required by statute to first demand the return of the amount paid from the Commissioner of Internal Revenue, it is true; nevertheless the suit is not against the United States, but a personal action against the collector, based upon his illegal collection. The United States is interested not at all until and except its proper executive officer, in the exercise of a discretion conferred upon him by statute, adopts the liability of the collector as that of the United States. *Sage v. United States,* 250 U. S. 33, 39 S. Ct. 415, 63 L. Ed. 828.

"Keeping in mind the nature of the present action, it seems plain that section 611 of the Revenue Act of 1928 furnishes no defense to the defendant. That section is not a specific retroactive ratification of the illegal collection by the defendant as its agent (as were the statutes under consideration in *United States v. Heinszen* and *Rafferty v. Smith, Bell & Co., supra.*), but a statute designed to control the Commissioner and his agent. If it has any retroactive force, it is in respect to a demand upon the United States for the return of an amount voluntarily paid, and not in connection with a personal suit theretofore brought against a collector of internal revenue to recover an amount paid under duress at a time when no legal liability existed on the part of the taxpayer."

We respectfully submit that the judgment of the Circuit Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

MAYNARD TEALL,

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